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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 558.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and JOHN H. JOHNSON, Sheriff and *ex officio* Treasurer of Wilkes County,

Petitioners,

vs.

W. N. COLER & COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING WRIT.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
Of Counsel.

C. A. Nimmons, Walker and Gordon Street, N. Y.

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This case was once before this court on a certificate made by the judges of the United States Circuit Court of Appeals for the Fourth Circuit, propounding to this court certain questions for instructions to guide the

said judges in their disposition of this case. The decision of this case in answer to the said questions is reported in *Wilkes County v. Coler*, 180 U. S., 506.

A copy of the bonds in question is set forth in the Record (p. 16).

We do not think it necessary on this application for a writ of *certiorari* to do more than to refer to the able opinions of Judges MORRIS and BOYD in the United States Circuit Court of Appeals, printed in the Record, pp. 110, 118, respectively, and to reprint as a part of this brief the brief which we filed in the United States Circuit Court of Appeals on the final hearing of this case. It is shown in the above-mentioned opinions of Judges MORRIS and BOYD, and in our said brief, that the decision of the United States Circuit Court of Appeals, in favor of the validity of these bonds, is clearly correct.

There was double lawful legislative authority for the issuance of these bonds, namely, the ordinance adopted by the Constitutional Convention of North Carolina, March 9, 1868, as well as the separate and independent authority of Sections 1996 to 2000 of the Code of North Carolina, and the bonds were issued in conformity to the said ordinance, and were also issued in conformity to the said sections of the Code.

After the decision of this Court in *Wilkes County vs. Coler*, 180 U. S., 506, and after the case went back, the Circuit Court of Appeals rendered the opinions and entered the judgment which the petitioners for *certiorari* now seek to review. The Circuit Court of Appeals followed the decision of this Court, and found that the principles laid down by this Court required a judgment in favor of the validity of the bonds in question, and that Court puts its judgment solely upon the effect of the ordinance adopted by the

Constitutional Convention, March 9, 1868, which is so fully discussed by this Court, and, doing so, the Circuit Court of Appeals found it unnecessary to consider the other source of authority for the issue of these bonds, to wit, the Code, Sections 1996–2000. By referring to the questions certified to this Court, and which were answered in the case of *Wilkes County vs. Coler, supra*, it will be seen that one of the cases referred to in the first question certified to this Court was as to the duty of the United States Court to follow the decision of the Supreme Court of North Carolina in the case of *Wilkes County vs. Call*, 123 N. C., 108. This Court held that it was not the duty of the Circuit Court of Appeals to follow that case so far as the ordinance of 1868 of the Constitutional Convention was concerned, basing this conclusion upon the *Belo* case and the *Hill* case, which had been decided years before by the same Supreme Court of North Carolina in respect of this very ordinance of 1868.

In the application for *certiorari* the petitioners attempt to re-discuss and to have brought again into review the effect of the said ordinance of the Constitutional Convention, and the effect of the decision of the Supreme Court of North Carolina in the case of *Wilkes County against Call.* The leading argument made by the petitioners' counsel for the writ of *certiorari* is based upon the misconception that there is necessarily involved in this record a conflict between the Circuit Court of Appeals and the Supreme Court of North Carolina. Not so. If there is any conflict between the decision of the Supreme Court of North Carolina in *Wilkes County vs. Coler*, and the Federal Courts that conflict is not with the Circuit Court of Appeals, but with the Supreme Court of the United States, and with its decision in the case of *Wilkes County vs. Coler*,

180 U. S., 506. By referring to the opinion of Justice HARLAN in this last named case, as well as to the briefs on file in that case, it will be found that every question which is made in the petition for a *certiorari* in this respect is discussed, page after page, by counsel on both sides in the case which was after full argument decided in this Court, and we well recollect that it was discussed full four hours at the bar of the Court, and the questions have all been threshed out and solemnly decided. There ought to be an end of this litigation. There is nothing in the questions made by the counsel for the petitioners which should encourage the prolongation of this controversy. The county's case is without the slightest merit, in law or in morality.

These bonds were issued in the year 1889, in aid of the railroad into Wilkes county.

The railroad was constructed, and has been in operation ever since.

Interest was paid by the county upon these bonds for many years after their issuance, and the bonds are owned by *bona fide* holders who have paid full value therefor.

In 1898, years after these bonds had been issued and sold, the Supreme Court of North Carolina, in the case of *Commissioners of Wilkes County v. Call*, 123 N. C., 308, which was a simulated and collusive case, being brought by the Commissioners of Wilkes County against the treasurer of Wilkes county, rendered a decision by a bare majority, in which the county treasurer was enjoined from paying interest on these bonds. The record in the official report, 123 N. C., 308, states the counsel appearing as follows:

"Mr. *A. C. Avery* for plaintiffs; no counsel *contra*."

It is this decision of the North Carolina Supreme Court, in this one-sided case, with counsel only on one

side, and rendered by a bare majority of the court, which the learned counsel for the county,—the same learned counsel that appeared in the Supreme Court of North Carolina in that case,—now claims is binding as an authority upon the United States courts in this action brought by the bondholders for the interest on their bonds. The proposition is monstrous. The bondholders who now have brought this action in the United States courts were not represented in the Supreme Court of North Carolina, nor was any other bondholder represented there. No arguments were made on behalf of the bondholders there. It does not appear but that if bondholders had been present, and if counsel had represented them, and presented arguments to the court, that court would have decided precisely as did the United States Circuit Court of Appeals in the present case. Indeed, we think it is clear, and that this court also will see from the opinions of Judges MORRIS and BOYD, and from our brief herewith printed as a part of this brief, that upon the presentation of the case for the bondholders only one conclusion can possibly be reached, namely, that these bonds are valid and enforceable against the county of Wilkes.

The question presented on this application for a writ of *certiorari* is very short,—Is the decision of the Circuit Court of Appeals right? If it is, that ends the controversy, and without reference to the decision of the collusive and simulated case of *Commissioners of Wilkes County v. Call*, 123 N. C., 308.

We notice that the learned counsel for the county of Wilkes has seen fit in his petition for *certiorari* to make statements reflecting upon the character of Judge BOYD, one of the judges of the United States court which rendered the decision in the present case. We are not

here to defend Judge BOYD, and we do not believe that he needs any defense. Our associate, Mr. PRICE, prints in his brief a personal letter from Judge BOYD, denying the charges made against him by the learned counsel for Wilkes county. Judge BOYD sat in this case without any objection from the counsel for Wilkes county. Not only so, but no objection could possibly have been made to him, for he was not an attorney for either party, and had no more interest in the result of this litigation than have the judges of this Supreme Court. The charge against Judge BOYD, however, is not the question before this court. The question, and the only question, presented on this petition for writ of *certiorari*, is this,—Is the decision of the Circuit Court of Appeals correct? If it is, that ends the matter, and we submit that it is clearly correct.

For the convenience of the court we here print in an Appendix various provisions of the constitution of North Carolina, ordinance of Constitutional Convention, and statutes of North Carolina, which this Court may desire to refer to or examine in connection with this case, and give references to places in the record, where the statutes not here reprinted may be found printed in full.

As the decision of the United States Circuit Court of Appeals is clearly correct, the petition for writ of *certiorari* should be denied.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
Of Counsel for Respondents.

APPENDIX.

Provisions of Constitution, Ordinance of Constitutional Convention and Statutes of North Carolina, which this Court may desire to refer to in connection with this case.

1.

The following are provisions of the *Constitution* of North Carolina (see Code of North Carolina, 1883, Volume 2):

"ARTICLE II.

"LEGISLATIVE DEPARTMENT.

* * * * * *

SECTION 12. "The General Assembly shall not pass any private law, unless it shall be made to appear thirty days' notice of application to pass such a law shall have been given under such direction, and in such manner as shall be provided by law."

* * * * * *

SECTION 14. "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly and passed three several readings, which readings shall have been on three different days and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal."

* * * * * *

SECTION 16. "Each House shall keep a journal of its proceedings, which shall be printed and made public

immediately after the adjournment of the General Assembly."

* * * * * *

SECTION 21. "The style of the acts shall be: 'The General Assembly of North Carolina do enact.'"

* * * * * *

SECTION 23. "All bills and resolutions of a legislative nature shall be read three times in each House before they pass into laws, and shall be signed by the presiding officers of both Houses."

* * * * * *

"ARTICLE IV.

"JUDICIAL DEPARTMENT.

SECTION 19. "The laws of North Carolina, not repugnant to this constitution, or the constitution and laws of the United States, shall be in force until lawfully altered."

ARTICLE V.

REVENUE AND TAXATION.

SECTION 1. "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The Commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

* * * * * *

SECTION 4. "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Con-

stitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

* * * * * *

SECTION 6. "The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

SECTION 7. "Every act of the General Assembly levying a tax, shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

ARTICLE VII.

* * * * * *

SECTION 7. "No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

SECTION 12. "All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this constitution."

2.

Ordinance of Constitutional Convention, passed March 9, 1868 (**authorizing bonds in question**), printed in full in Record, page 10.

3.

Chapter 136, Laws of North Carolina, Session of 1852, Sections 33 to 37, inclusive (being the act referred to in Section 12 of the said ordinance of March 9, 1868), printed in full in Record, page 54.

4.

Act of August 11, 1868, printed in full in Record, page 13.

5.

Act of February 20, 1879, printed in full in Record, page 14.

6.

Act of March 2, 1881, printed in full in Record, page 17.

7.

Sections 1996–2000 of the Code of North Carolina of 1883 (**also authorizing bonds in question**) :

"SEC. 1996. The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.

SEC. 1997. The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and, if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And, if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies. Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such

amounts, either in bonds or money, as they may think proper.

SEC. 1998. All elections ordered under the preceding section shall be held by the sheriff under the laws and regulations provided for the election of members of the General Assembly. The votes shall be compared by *the board of county commissioners*, who shall make a record of the same.

SEC. 1999. In case the *county* shall subscribe the amount proposed in bonds, *the board of commissioners shall have power* to fix the rate of interest, not to exceed the rate of eight per cent., when the interest on said bonds shall be payable, and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds.

SEC. 2000. The taxes authorized by the three preceding sections to be raised for the payment of interest or principal shall be collected by the *sheriff in like manner as other State taxes*, and be paid into the hands of the county treasurer to be used by the chairman of the board of county commissioners as directed by this chapter."

It is admitted by all parties and all courts that these sections of the Code are constitutionally valid, and authorize the issue of bonds on the conditions therein prescribed.

Code sections 1996 to 2000 were originally the act of April 10, 1869, the title of which was, "An act to authorize the several counties of the State to take stock in railroad companies." Chapter 171, Public Laws, North Carolina, 1868–69. Ratified April 10, 1869. Public Laws, North Carolina, 1868–69, page 417. Re-enacted in Battle's Revisal, January 1, 1874; re-enacted in Code of North Carolina which went into effect November 1, 1883.